90-1967

Supreme Court, U.S.
FILED
JUN 24 1991
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL CORBITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY B. STEINBACK
Counsel of Record
GENSON, STEINBACK & GILLESPIE
53 West Jackson Boulevard, Suite 1420
Chicago, Illinois 60604
(312) 726-9015

Attorney for Petitioner Corbitt

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

I.

A. When does the statute of limitations commence for purposes of RICO conspiracy?

B. Can the petitioner's RICO conspiracy conviction be upheld over a statute of limitations objection where the government failed to establish that the petitioner agreed to the commission of a predicate act five years prior to the indictment?

C. In spite of *Grunewald v. United States*, 353 U.S. 391 (1957) and the jury's findings rejecting the government's concealment theory, can an alleged concealment phase nonetheless save a RICO conspiracy conviction in the face of a statute of limitations objection?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PRAYER	1
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THIS PETITION:	
I. THE SEVENTH CIRCUIT DECISION IN EFFECT RENDERS THE CRIME OF RICO CONSPIRACY IMMUNE FROM A STATUTE OF LIMITATIONS BAR, CONFLICTS WITH THIS COURT'S HOLDINGS IN *GRUNEWALD v. UNITED STATES*, 353 U.S. 391 (1957) AND OTHER RELATED CASES AND IS UNSUPPORTED BY THE RECORD	6
CONCLUSION	16

APPENDICES

A—Opinion and Order of the Court of Appeals, February 6, 1991	App. 1
B—Order of the Court of Appeals Denying Rehearing, March 28, 1991	App. 13
C—Judgment and Sentence of the District Court, August 24, 1989	App. 14

TABLE OF AUTHORITIES

Cases	PAGE
Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143 (1987)	6
Grunewald v. United States, 353 U.S. 391 (1957)	*passim*
Kotteakos v. United States, 328 U.S. 750 (1946)	12
Krulewitch v. United States, 336 U.S. 440 (1949)	4, 13
Lutwak v. United States, 344 U.S. 612 (1952)	13
Pendergast v. United States, 317 U.S. 412 (1943)	7
Toussie v. United States, 397 U.S. 112 (1970)	7, 12
United States v. Coia, 719 F.2d 1120 (11th Cir. 1984)	9
United States v. Irvine, 98 U.S. 450 (1879)	7
United States v. Marion, 404 U.S. 307 (1971)	12
United States v. Masters, 924 F.2d 1362 (7th Cir. 1991)	4, 5
United States v. Neapolitan, 791 F.2d 489 (1986)	7, 8
United States v. Patel, 879 F.2d 292 (7th Cir. 1989)	5
United States v. Persico, 832 F.2d 705 (2nd Cir. 1987)	9, 10, 11
United States v. Salerno, 868 F.2d 524 (2nd Cir. 1989)	9, 11, 12
United States v. Torres Lopez, 851 F.2d 520 (1st Cir. 1988)	9

Constitutional Provisions

U.S. CONST. art. III § 3 12
U.S. CONST. art. I §§ 9, 10 12

Statutes

18 U.S.C. § 1962(c) 7
18 U.S.C. § 1962(d) 7
18 U.S.C. § 3282 7
28 U.S.C. § 1254 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL CORBITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

PRAYER

Petitioner Michael Corbitt respectfully moves this Honorable Court to enter an order granting the petition for writ of certiorari to the Seventh Circuit Court of appeals.

OPINIONS BELOW

The opinion of the Seventh Circuit is published at 924 F.2d 1362. The opinion and order of the Seventh Circuit are reproduced in Appendix A. The judgment order of the district court is reproduced in Appendix C.

JURISDICTION

On February 6, 1991, the Seventh Circuit affirmed Corbitt's conviction for RICO conspiracy. Corbitt then filed a timely petition for rehearing. The petition for rehearing was denied on March 28, 1991 and is reproduced in Appendix B. This is filed within 90 days from the order denying the petition for rehearing and is thus timely. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A special grand jury sitting in the Northern District of Illinois returned the indictment on June 13, 1988. The indictment named three defendants, Alan Masters, James Keating and Michael Corbitt, and contained four counts alleging violations of the RICO, RICO conspiracy and mail fraud statutes. Petitioner Michael Corbitt was named as a defendant in only one count, the RICO conspiracy violation alleged in count two. Count two, in turn, incorporated by reference the pattern of racketeering activity set forth in count one, a substantive RICO count.

The defendants played various roles in the Cook County, Illinois criminal justice system. Masters was a defense attorney, allegedly adept at fixing cases. Corbitt was a police officer and acted as police chief of Willow Springs (a Chicago suburb) until June 1982 at which time he lost his job and ceased functioning as a police officer. James Keating was a high-ranking member of the Cook County Sheriff's police.

The pattern of racketeering activity at issue can be described as follows. Racketeering act one took place from October 1970 to June 1982 and involved Alan Masters allegedly paying Corbitt (in violation of Illinois' bribery statute) for Corbitt's referral of criminal cases to Masters. Racketeering act two dealt with Masters' alleged payment to Cook County Sheriff's Officers in 1979 to "fix" a criminal case and effectuate the return of property; this act did not name or allude to Corbitt. Racketeering act three alleged that in March and April 1981, Masters, with the aid of Corbitt, paid money in violation of Illinois law to Cook County Sheriff's Police Officers to "fix" the criminal case of Fred Kuhnke and obtain return of Kuhnke's property. Racketeering act four concerned Masters' alleged payments to co-defendant James Keating from 1972 to 1984 for protection of bookmakers operating in Cicero; this act did not name or allude to Corbitt. Act five alleged that Masters, Corbitt and Keating planned, solicited, aided and abetted and concealed the murder of Dianne Masters, the wife of Alan Masters.[1] Finally, racketeering act six averred that Masters schemed to defraud an insurance company in conjunction with his wife's death.

Michael Corbitt was tried by jury. The jury returned a guilty verdict on the single count in which he was charged. The jury also found Corbitt's co-defendants guilty of RICO and RICO conspiracy charges. Co-defendant Alan Masters was acquitted of the mail fraud charges. The jury ordered forfeiture of $42,000 in supposed bribe money,[2] but re-

[1] Masters' efforts to collect life insurance proceeds for his wife's death formed the basis of the mail fraud counts. As noted, the mail fraud counts did not name Corbitt.

[2] The $42,000 in bribe money represented an estimate of the total bribe money involved between Masters, Keating and Corbitt.

fused forfeiture of Dianne Masters' jewelry and personal and real property.

Corbitt appealed to the Seventh Circuit. While joining in his co-defendants' contentions, his primary thrust concerned the statute of limitations. The court, Justice Richard A. Posner writing, affirmed Corbitt's RICO conspiracy conviction over the statute of limitations objections. Justice Posner's treatment of the issue can be reproduced in full here:

> A more difficult issue is whether the statute's five-year statute of limitations bars the conspiracy charge against Corbitt, who lost his office as Willow Springs police chief in June 1982, six years before the indictment was handed down. We think not. Among the elements of the conspiracy with which Corbitt was charged was that he had agreed with the other two defendants "to conceal their actions involving the murder of Dianne Masters and . . . to participate in such concealment indefinitely." The defendants do not deny that if there was such an agreement it was still in force five years before the indictment. The jury found that such an agreement existed and that Corbitt was a party to it, and the evidence supports these findings.
>
> It is true that *Grunewald v. United States*, 353 U.S. 391 (1957), and earlier cases cited in it such as *Krulewitch v. United States*, 336 U.S. 440 (1949), hold that efforts to conceal a conspiracy are not automatically a part of the conspiracy. But we do not understand these cases to hold that a conspiracy can never include an agreement to conceal the defendant's conduct. The distinction is between the government's attempting to infer the existence of a conspiracy to conceal "from circumstantial evidence showing merely that the conspiracy was kept secret and that the conspirators took care to cover up their crime in order to escape detection and punishment," *Grunewald v. United*

> *States*, *supra*, 353 U.S. at 402, and "an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission." *Id.* at 404. The conspirators in this case, signally including Corbitt, intended from the first to exert strenuous efforts to prevent discovery of the crime and of their involvement in it; the fact that two of the three conspirators were policemen supports the inference that concealment was part of the original conspiracy and not a spontaneous reaction to fear of arrest and prosecution. It was also a fair inference that the defendants agreed to keep trying to conceal the conspiracy for as long as they could, using their official positions where possible. And there is no evidence that Corbitt, upon losing his position as chief of police of Willow Springs or at any other time, withdrew from the agreement. We must not forget that 'withdrawal' is a term of art in the law of conspiracy. It is not enough that Corbitt ceased, "however definitively, to participate"; since he "did not communicate his abandonment to any of his co-conspirators and he did not make a clean breast to the authorities," he did not withdraw. *United States v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989). On the contrary, Corbitt hoped to get another chief's job in the western suburbs, the area of the conspiracy's operations, and there is no evidence of when, if ever, he ceased harboring such hopes.

United States v. Masters, 924 F.2d 1362, 1368 (7th Cir. 1991).

Corbitt now moves this Honorable Court to issue a writ of certiorari to examine the statute of limitations reiationship to the elusive crime of RICO conspiracy.

REASON FOR GRANTING THIS PETITION

I.

THE SEVENTH CIRCUIT DECISION IN EFFECT RENDERS THE CRIME OF RICO CONSPIRACY IMMUNE FROM A STATUTE OF LIMITATIONS BAR, CONFLICTS WITH THIS COURT'S HOLDINGS IN *GRUNEWALD v. UNITED STATES*, 353 U.S. 391 (1957) AND OTHER RELATED CASES AND IS UNSUPPORTED BY THE RECORD.

Michael Corbitt was indicted for a single count of RICO conspiracy. Unlike co-defendants James Keating and Alan Masters, Corbitt was not charged in count one, the substantive RICO count. In the district court, the government explained in a pretrial memorandum that "Corbitt has not been charged in Count One, precisely because none of the predicate racketeering acts charged against him personally occurred within five years of the return of the indictment", (R. 60, at p. 6), and reiterated this theme during its closing argument by stating, "Corbitt is not charged [in count one], and that has something to do with the statute of limitations." (Tr. 3182-83)[3]

While the RICO statute does not contain an express statute of limitations, this Court has decided that the general five year statute of limitations set forth in 18 U.S.C. § 3282 applies to RICO prosecutions. *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 146 (1987). This statute of limitations provides:

---

[3] Corbitt pressed the statute of limitations issue throughout all stages of this litigation. The district court and the Seventh Circuit denied relief.

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years after such offense shall have been committed.

18 U.S.C. § 3282.

This does not end the matter. It must be determined when the statute of limitations begins to run for a violation of the RICO conspiracy statute, an issue of importance that has not been addressed by this Court.

This Court has ruled that the statute of limitations normally begins to run when the crime is complete. *Toussie v. United States*, 397 U.S. 112, 115 (1970); *Pendergast v. United States*, 317 U.S. 412, 418 (1943); *United States v. Irvine*, 98 U.S. 450, 452 (1879). The question becomes: At what point is the crime of RICO conspiracy complete? This, of course, turns on an analysis of the RICO conspiracy statute, 18 U.S.C. § 1962(d).[4] *See also Pendergast*, 317 U.S. 416-21 (analyzing contempt statute under which the government prosecuted the defendants to determine when the statute of limitations commences).

Two agreements are necessary to establish a RICO conspiracy: "an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commis-

---

[4] 18 U.S.C. § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

In turn, 18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

sion of at least two predicate acts." *United States v. Neapolitan*, 791 F.2d 489 (1986). Accordingly, the question of when is a RICO conspiracy complete can be answered in a straightforward fashion. A RICO conspiracy is complete when the defendant agrees to conduct or participate in the affairs of the enterprise and agrees to the commission of two predicate acts. It is at that point—when both agreements necessary for a RICO conspiracy have been consummated—that the crime of RICO conspiracy is complete. It is then that the government can charge, prosecute and obtain a RICO conspiracy conviction. Assuming a defendant has agreed to participate or conduct the affairs of the enterprise, the statute of limitations should begin to run from the date on which the defendant last agreed to the commission of a predicate act[s].

In this case, all of Corbitt's alleged agreements certainly occurred more than five years before the return of the indictment. No evidence suggests that Corbitt agreed to the commission of a predicate act after June 13, 1983. The indictment expressly alleged that Corbitt was involved in three predicate acts. None of the alleged acts occurred within five years of the return of the indictment. Racketeering activity number one concerned alleged official misconduct and bribery between Corbitt and Masters, with Masters allegedly paying Corbitt for the referral of cases. The indictment alleged that this activity occurred from October 1970 to June 1982. (Corbitt lost his job as police chief of Willow Springs in June 1982.) At trial, the government failed to demonstrate that said bribery occurred or was agreed to after June 13, 1983, the cut-off date for the statute of limitations. Racketeering activity number three alleged that Corbitt acted as an intermediary for a payment by Fred Kuhnke (who was represented by Masters) to Cook County Sheriff's Police Officers for

the dismissal of criminal charges against Kuhnke and the return of property. The indictment alleged that this activity occurred in March or April of 1981. The government's evidence suggested that Kuhnke paid Masters the $12,000 and had his case dismissed on April 23, 1981. The final racketeering activity involving Corbitt was alleged to have occurred "[f]rom sometime in 1981 to on or about December 11, 1982." (Masters R. 1; App. 1) This act centered around the death of Dianne Masters. From the face of the indictment, it is clear that the racketeering act was consummated more than five years before the return of the indictment. Moreover, Corbitt's alleged involvement occurred on March 19, 1982 and Dianne Masters' body was discovered on December 11, 1982—both dates being more than five years before the return of the indictment.

All of the racketeering acts involving Corbitt were themselves complete more than five years before the return of the indictment. Thus, the agreements to commit those acts obviously came more than five years prior to the indictment's return. As Corbitt completed commission of the crime of RICO conspiracy at a point outside the grasp of the five year statute of limitations, his conviction is time-barred.

Unfortunately, lower federal courts have ruled that a RICO conspiracy does not terminate (and as a result commence the running of the statute of limitations) until its objectives have either been accomplished or abandoned. *See United States v. Salerno*, 868 F.2d 524, 534 (2nd Cir. 1989); *United States v. Torres Lopez*, 851 F.2d 520, 522 (1st Cir. 1988); *United States v. Persico*, 832 F.2d 705, 713 (2nd Cir. 1987); *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir. 1984). Add this case to the list. Justice Posner believed that Corbitt's halting criminal activity was insufficient to start the statute of limitations clock.

Rather, Justice Posner ruled that the term of the statute of limitations does not commence until the offender withdraws from the conspiracy by communicating abandonment to co-conspirators and notifying the authorities. Accordingly, absent withdrawal, the courts in this case and the ones cited above have judicially created an indefinite statute of limitations for the crime of RICO conspiracy.

The validity of such a broad statute of limitations standard has been questioned. In *Persico*, Judge Newman, concurring in part and dissenting in part, found the majority's statute of limitations analysis incompatible with the nature of RICO conspiracy. Judge Newman noted that "each defendant charged with a RICO conspiracy must be shown not only to have joined the overall criminal enterprise conspiracy but also to have joined specific conspiracies to commit at least two predicate acts." *Persico*, 832 F.2d at 721. Accordingly, Judge Newman reasoned that a defendant cannot be convicted of RICO conspiracy where the government fails to prove that a specific conspiracy to commit a predicate act continued into the limitations period. *Id.* Judge Newman further commented:

> If a defendant can be convicted of a RICO conspiracy whenever the objectives of the overall conspiracy continue into the limitations period, there seems little point in requiring proof of his agreement to commit two predicate acts. Indeed, as this case illustrates, it is extremely anomalous to insist that at least one predicate act occur within the limitations period in order to convict on a RICO substantive count and not require that at least one conspiracy to commit a predicate act continue into the limitations period in order to convict on a RICO conspiracy count. McIntosh and Russo committed the RICO substantive offense when they first joined the Colombo Family criminal enterprise and thereafter committed the Annicharico bribery offenses. They committed the RICO conspiracy

> offense when they first *agreed* to join the Colombo Family criminal enterprise and thereafter *agreed* to commit the Annicharico bribery offenses. Their conviction on the substantive offense is now vacated because these bribery offenses were completed before the limitations period and no other predicate act occurred within the limitations period. But they stand convicted of the conspiracy offense even though their agreement to commit the bribery offenses ended before the limitations period (when those offenses were complete) and no agreement to commit any other predicate act continued within the limitations period. Thus, these defendants are exonerated because the predicate acts they committed occurred more than five years prior to indictment, but they remain convicted even though their agreement to commit those same acts also ended more than five years prior to indictment. I do not understand how the criminal law can deal more harshly with a defendant who only *agrees* to commit a time-barred predicate act than with a defendant who *commits* such an act.

Id. at 721-22.

In *Salerno*, Senior Judge Bright raised similar objections. Concurring in part and dissenting in part, Judge Bright stated:

> The doctrines of conspiratorial liability are broad. The RICO statute is loosely worded and contains almost limitless potential for expansive interpretation. A complete grafting of the former principle upon the latter statute presents, I believe, a frightening prospect. Under *Persico*, prosecutors can bootstrap a conspiracy charge on a defendant's substantive act committed outside the five-year limitations period by linking it to acts committed by others within the statutory period. This linkage brings both offenses within the statute of limitations. Indelicato's case provides a disturbing paradigm. Even assuming that the 1979 murders were performed at the Commission's instance,

> it is unclear that Indelicato continued as an associate involved in Commission affairs. However, to convict, the jury needed only to determine that Indelicato did not affirmatively disassociate himself from the Commission conspiracy. Such determination brings the 1979 murders within the five-year limitations period by making Indelicato responsible for the many predicate acts committed by other Commission members. It is wrong to incorporate general conspiracy principles onto the RICO statute where such gross expansion of criminal liability results, without proof that the defendant engaged in any criminal activity.

Salerno, 868 F.2d at 546-47.

This petition should be granted to resolve the divergent judicial thinking. Clearly, the standard advocated by Judges Newman and Bright is the better one. It gives more than mere lip service to the proposition that statutes of limitations are to be interpreted in favor of repose, *United States v. Marion*, 404 U.S. 307, 322 n. 14 (1971) and *Toussie v. United States*, 397 U.S. 112, 115 (1970), as well as the American ideal that guilt should be personal. *See Kotteakos v. United States*, 328 U.S. 750 (1946). *See also* U.S. CONST. art. I § 9, 10 and art. III § 3 (prohibiting bills of attainder and corruption of blood). Applying the test urged by Judges Newman and Bright in *Salerno* and *Persico*, Corbitt's conviction must be reversed since the government failed to produce any evidence that Corbitt agreed to the commission of any racketeering act that continued after June 13, 1983, five years before the return of the indictment.

Justice Posner also upheld Corbitt's conviction by relying on the concealment aspect of the alleged conspiracy. In so doing, the lower court veered far off of the course set by prior cases from this Court. In *Grunewald v. United States*, 353 U.S. 391 (1957), the Supreme Court rejected

a claim similar to the one accepted below. In *Grunewald*, the Court spurned the government's argument that under the presented facts an agreement to conceal a conspiracy constituted a component of the conspiracy and therefore extended the conspiracy's duration for purposes of the statute of limitations. *See also Krulewitch v. United States*, 336 U.S. 440 (1948) (statements made by co-conspirators after conspiratorial objectives had been met could not be admitted into evidence on the basis of an implied agreement to conceal the conspiracy); *Lutwak v. United States*, 344 U.S. 612 (1952) (notwithstanding the express allegation that concealment was part of the conspiracy, the government failed to prove such a subsidiary agreement and therefore co-conspirator statements made during the so-called "concealment" phase were inadmissible). The *Grunewald* Court stressed that allowing a conspiracy to conceal to be inferred from overt acts of concealment "would extend the life of the conspiracy indefinitely." *Id.* at 402. The Court also emphasized that "[s]anctioning the government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases." *Id.* The Court further commented:

> Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in Krulewitch v United States, (US) supra. It is these considerations of policy which govern our holding today. As this case was tried, we have before us a typical example of a situation where the Government, faced by the bar of the three-year statute, is attempting to open the very floodgates against which Krulewitch warned. We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because

> the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.

Id. at 404-05.

On the basis of this Court's decision in *Grunewald*, the alleged subsidiary conspiracy to conceal cannot save Corbitt's conviction from a statute of limitations bar. The supposed concealment here pertained to the fifth racketeering act, Dianne Masters' murder. *See* Masters R. 1, Indict. Count Two, para. 10, App. 12 ("It was further part of the conspiracy that defendants Alan Masters, Michael J. Corbitt and James D. Keating agreed to conceal their actions involving the murder of Dianne G. Masters and agreed to participate in such concealment indefinitely."). This alleged agreement to conceal, however, amounted to nothing more than the conspirators wanting to avoid apprehension, rather than being a distinct criminal objective. As *Grunewald* teaches, such concealment cannot be utilized to extend the statute of limitations.

Contrary to the holding of the court below, the mere facts that the defendant was at one time a policeman and allegedly hoped to regain a job in the law enforcement field are not cognizable grounds to remove this case from *Grunewald's* grasp. *Grunewald*, of course, contains no such exceptions. More importantly, *Corbitt was not even a police officer during the alleged concealment phase as he lost his job in June 1982*! That Corbitt did not present evidence that he did not harbor a hope of regaining another job in the law enforcement field is simply an insufficient basis upon which to strip Corbitt of statute of limitations protection.

To support its deviation from *Grunewald*, the Seventh Circuit stated that the jury found that an agreement to

conceal existed. However, this finding, critical to the disposition, overlooks the indictment and the express findings of the jury.

The indictment's most precise allegation of concealment came in Count One, Racketeering Act Number Five, paragraph 7(c): "From on or about March 19, 1982 to on or about December 11, 1982, defendants ALAN MASTERS, MICHAEL J. CORBITT and JAMES D. KEATING, acted to conceal the homicidal death of Dianne G. Masters and participated in the concealment of the murder of Dianne G. Masters, and facts surrounding that murder, from various law enforcement agencies and others." (R. 1; Govt's App. 8) Count Two, the RICO conspiracy, expressly incorporated this specific allegation by reference, and made it part of the pattern of racketeering activity agreed to by Corbitt and the other defendants. On its face, the concise concealment allegation (which comprised a part of the pattern necessary for RICO conspiracy) stated that the concealment ceased by December 11, 1982—more than five years before the indictment's return! Accordingly, as a matter of law, the alleged concealment phase cannot save Corbitt's prosecution.

Furthermore, examining the jury's findings, it is plain that, contrary to the statement of the court, the jury actually rejected the government's concealment theory. In the context of the substantive RICO count, the jury was asked to return findings on the concealment allegation. Paragraph 7(c) of the indictment (i.e., the concealment allegation) translated into Racketeering Activity Number 5(c) on the RICO verdicts of Masters and Keating. *The jury refused to check activity 5(c), thereby expressing its finding that the government did not prove Racketeering Activity Number 5(c), i.e., the alleged concealment.* Thus, the lower court's conclusion that the jury found for the government on the concealment issue simply is unsupported.

In sum, the rule crafted by the lower court in effect allows an indefinite statute of limitations for RICO conspiracy. While this Court, on several occasions, has denounced indefinite statute of limitations in the context of conspiracy prosecutions, the lower court misconstrued and deviated from this Court's precedents. Further, the lower court's justification for its result is belied by the jury's factual findings. For all of these reasons, certiorari should be granted, and Michael Corbitt's conviction should be reversed.

CONCLUSION

WHEREFORE, based on the foregoing, Petitioner Michael Corbitt respectfully moves this Honorable Court to enter an order granting a writ of certiorari to review the order and judgment of the Seventh Circuit Court of Appeals and to enter an order reversing his conviction or granting any other relief that is deemed appropriate and equitable.

Respectfully submitted,

JEFFREY B. STEINBACK
Counsel of Record
GENSON, STEINBACK & GILLESPIE
53 West Jackson Boulevard, Suite 1420
Chicago, Illinois 60604
(312) 726-9015

Attorney for Petitioner Corbitt

APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-2851, 89-2872, 89-2873

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALAN MASTERS, MICHAEL J. CORBITT,
and JAMES D. KEATING,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 CR 500—**James B. Zagel,** *Judge.*

ARGUED DECEMBER 14, 1990—DECIDED FEBRUARY 6, 1991

Before BAUER, *Chief Judge*, and POSNER and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* Alan Masters and James Keating were charged in 1988 with, among other things, having "conduct[ed an] . . . enterprise's affairs through a pattern of racketeering activity" in violation of 18 U.S.C. § 1962(c), and (along with Michael Corbitt) of having conspired to do so, in violation of § 1962(d); both are, of course, provisions of the RICO (Racketeer Influenced and Corrupt Organizations) statute. The statute provides that "enter-

prise" "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." § 1961(4). The statutory term "pattern of racketeering activity" "requires at least two acts of racketeering activity," § 1961(5), defined as violations of various federal and state statutes. The jury found Masters and Keating guilty on both counts and Corbitt guilty on the conspiracy count—the only one he had been charged with, because the statute of limitations had expired on his substantive violations. The judge gave Masters and Keating consecutive prison sentences of 20 and 20, and 20 and 15, years, respectively, and Corbitt 20 years. The judge also fined Masters $250,000 on the conspiracy count and ordered all three defendants to forfeit criminal proceeds of $42,000. These are all pre-Sentencing Guidelines sentences. There were other counts in the indictment besides the two RICO counts, but the jury acquitted the defendants on those counts.

There is no challenge to the jury instructions, so we must construe the facts as favorably to the prosecution as the trial record and the jury verdict permit. The facts are a lurid mixture of corruption and murder in a west suburban Chicago setting. Masters was a lawyer, Keating a lieutenant in the Cook County Sheriff's Police Department who commanded the vice squad and later the criminal investigative unit, and Corbitt the chief of police of Willow Springs. The RICO enterprise, as the government conceives it, was an informal association among the three defendants and three other entities (so a total of six in all): Masters' law firm (a professional corporation of which he was the sole shareholder and which employed another lawyer) and the two police departments. Between 1970 and June 1982, when Corbitt lost his job as chief of police of Willow Springs, Masters bribed Corbitt to refer persons arrested, ticketed, or investigated by the Willow Springs Police Department to Masters for legal assistance. Masters had similar kickback schemes with other police officers in the area. Keating entered the picture in 1972, two years after Corbitt. Between then and August 1984 Mas-

ters was the middleman in a scheme in which illegal bookmakers in Cicero, Illinois bribed Keating and officers under Keating's command to leave them alone.

In 1981 Masters discovered that his wife, Dianne, was having an affair. He asked a friend in the Cook County Sheriff's Police Department who would be in charge of any investigation arising out of events at Masters' home, and was disappointed when told that it would not be Keating. In January 1982 Dianne Masters hired a lawyer to file for a divorce. She let it be known that she hoped to obtain custody of her and Masters' four-year-old daughter. Masters hired a former police officer, Ted Nykaza, to install recording equipment in the Masters household for the purpose of eavesdropping on telephone conversations between Dianne and her paramour. Listening, with Nykaza and a Cook County Sheriff's Police sergeant, to one of the recorded conversations, Masters thought he heard Dianne and her paramour reminisce about the paramour's inserting a wine bottle into Dianne's vagina as part of their sex play. Masters exploded with anger and declared that he would have Dianne killed. Later he told a friend that he would ask Keating to kill her. Keating offered a former Cook County Sheriff's Police officer $25,000 to kill Dianne on Masters' behalf, explaining that Corbitt was unwilling to do the killing himself but had agreed to dispose of the body.

Dianne Masters disappeared in the early morning of March 19, 1982. Her body was recovered from the trunk of her car nine months later when the car was discovered submerged in a canal near Willow Springs. She had been beaten and shot. Probably Corbitt had driven the car into the canal, though the jury's findings on this point are ambiguous. In the following months Keating used his position in the Cook County Sheriff's Police Department to obstruct the investigation of Dianne Masters' disappearance. Masters collected the proceeds of a $100,000 policy on Dianne's life. No one was ever charged with the murder.

The jury found that Masters had planned and solicited the murder of Dianne, that Keating had aided and abetted

Masters' planning and solicitation, that Keating had obstructed the investigation, that (subject to our earlier qualification) Corbitt had sunk the car in the canal, and that all three defendants had agreed to conceal their actions relating to Dianne's murder indefinitely.

There is no question that the jury found, on sufficient and indeed abundant evidence, that defendants Masters and Keating committed, and all three defendants conspired to commit, two or more criminal acts that constitute "racketeering activity" within the meaning of the RICO statute. There were many distinct acts of bribery, criminal solicitation, and other crimes that come within the broad statutory definition of racketeering activity. The questions relate to the statutory requirements of "enterprise" and of "pattern." The alleged enterprise is an informal consortium of a law firm and two police departments with the three individuals who are the defendants. The defendants argue that a RICO enterprise, unless it is a legal entity such as an individual, a partnership, or a corporation, can only be a "union or group of *individuals*" (emphasis added), which Masters' law firm, the Willow Springs Police Department, and the Cook County Sheriff's Police Department are not. The argument has repeatedly and we think correctly been rejected, illustrative decisions being *United States v. Feldman*, 853 F.2d 648, 655 (9th Cir. 1988), and *United States v. Perholtz*, 842 F.2d 343, 352-53 (D.C. Cir. 1988) (per curiam). The statute says " 'enterprise' includes"—not " 'enterprise' means." The point of the definition is to make clear that it need not be a formal enterprise; "associated in fact" will do. Surely if three individuals can constitute a RICO enterprise, as no one doubts, then the larger association that consists of them plus entities that they control can be a RICO enterprise too. Otherwise while three criminal gangs would each be a RICO enterprise, a loose-knit merger of the three, in which each retained its separate identity, would not be, because it would not be an association of individuals. That would make no sense.

The next question is whether the acts of this enterprise formed a pattern. That rarely is a problem with a criminal enterprise, as distinct from a lawful enterprise that commits occasional criminal acts. The business of a criminal enterprise is crime. The crimes form a pattern defined by the purposes of the enterprise. *United States v. Pungitore*, 910 F.2d 1084, 1104 (3d Cir. 1990); *United States v. Anguilo*, 897 F.2d 1169, 1180 (1st Cir. 1990); *United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir. 1989) (en banc) ("two racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise"). The main purpose of the enterprise in this case was to bring under Masters' influence (for a price of course) the principal police agencies operating in his area of activity. He used this influence to obtain law business and to protect his clients. Like many a small businessman, legal and illegal, Ianni, A Family Business: Kinship and Social Control in Organized Crime 112, 127, 142 (1972), he did not make a rigid division between his business and his personal affairs. So when his wife's adultery and projected divorce brought about a personal crisis that he believed could best be resolved through murder, it was natural for him to "hire" his own criminal enterprise to help with the job. If it could protect bookmakers, maybe it could protect a murderer.

A criminal enterprise is more, not less, dangerous if it is versatile, flexible, diverse in its objectives and capabilities. Versatility, flexibility, and diversity are not inconsistent with pattern. The systematic corruption of law enforcement in the west Chicago suburbs brought about by the Masters enterprise could be used for a variety of purposes without destroying the integrity, the rationale, of the enterprise. The acts of a criminal enterprise within the scope of the enterprise's evolving objectives form pattern enough to satisfy the requirements of the RICO statute.

The most difficult issue relating to enterprise and pattern in this case is whether the two are separate. If the "enterprise" is just a name for the crimes the defendants

committed, or for their agreement to commit these crimes that was charged separately in the conspiracy count, then it would not be an enterprise within the meaning of the statute. *United States v. Turkette*, 452 U.S. 576, 583 (1981); *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986). Otherwise two statutory elements—enterprise and pattern—would be collapsed into one. The jury was properly instructed, however, that it had to find that the informal enterprise consisting of the three defendants and the three organizations that they controlled or manipulated existed as an organization with a structure and goals separate from the predicate acts themselves, and we cannot say that the jury's finding that it had such existence was without rational support in the record. The strongest evidence is the handling of the problem of dealing with Dianne Masters. When that problem arose, a loose-knit but effective criminal organization was in place ready to respond effectively by planning and carrying out a detection-proof crime that would have been beyond the capacities of the individual defendants acting either singly or without the aid of their organizations.

Criminal enterprises have less structure than legal ones. For formal relationships created by contract and rule they substitute informal relationships based on kinship and friendship. Ianni, *supra*, at 154, 157, 172. It would be ironic if the RICO statute, aimed primarily at criminal enterprises such as the Mafia and its many petty imitators, was more effective against legal enterprises because the latter have a more perspicuous, articulated structure.

Despite the admitted elusiveness of the statutory terms, well illustrated by the preceding discussion, we do not agree with the defendants that, as applied to their activities, the statute is unconstitutionally vague. *United States v. Glecier*, No. 88-3417, slip op. at 2 n. 1 (7th Cir. Jan. 8, 1991). Provided the statutes criminalizing the predicate acts are not unconstitutionally vague—and no one argues they are—the defendants are on adequate notice that they are committing crimes, and the fact that they may not be aware of the extent of their criminality and consequent

exposure to punishment is a detail (the original conception of RICO as a sentence-enhancement provision is pertinent here). So at least *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 58 (1989), appears to hold, although a narrower reading is proposed in *United States v. Pungitore, supra*, 910 F.2d at 1103 n. 15. But forget *Fort Wayne Books* and the decision in this case must still be the same. The interpretive problems and resulting vagueness that afflict the RICO statute come from its application to lawful enterprises that commit occasional criminal acts. The miniature suburban mafia that the facts of this case disclose is within the statute's core.

The remaining issues raised by these appeals form a miscellany—not a pattern.

1. The issue of whether Judge Zagel should have recused himself under 28 U.S.C. § 455(a) because he was chief of the Illinois state police at the time it investigated (but failed to solve) Dianne Masters's murder was waived because not raised in an action for mandamus. *United States v. Troxell*, 887 F.2d 830, 833 (7th Cir. 1989).

2. The district judge did not commit reversible error in refusing to allow the defendants as part of their cross-examination of Ted Nykaza to inquire into his habit of wearing women's underwear. When Dianne Masters' body was found, it was missing its panties. At trial the defendants proposed that Nykaza had killed her because of his fetish for panties. This was hardly an impressive theory. Transvestites are not usually murderers. It is easy enough for them to buy articles of female clothing—they don't have to kill for it. In fact defense counsel were allowed to ask Nykaza about his fetish, and he acknowledged it. The judge was quite right to cut off further inquiry; the details of Nykaza's fetish would have been spicy, but peripheral to the issues because there was no suggestion that violence was an aspect of the fetish. Fed. R. Evid. 403. And if there was error here it was harmless, since it went to a charge—conspiracy to murder, as distinct from conspiracy to solicit and conceal—on which the defendants were acquitted.

3. A more difficult issue is whether the statute's five-year statute of limitations bars the conspiracy charge against Corbitt, who lost his office as Willow Springs police chief in June 1982, six years before the indictment was handed down. We think not. Among the elements of the conspiracy with which Corbitt was charged was that he had agreed with the other two defendants "to conceal their actions involving the murder of Dianne Masters and . . . to participate in such concealment indefinitely." The defendants do not deny that if there was such an agreement it was still in force five years before the indictment. The jury found that such an agreement existed and that Corbitt was a party to it, and the evidence supports these findings.

It is true that *Grunewald v. United States*, 353 U.S. 391 (1957), and earlier cases cited in it such as *Krulewitch v. United States*, 336 U.S. 440 (1949), hold that efforts to conceal a conspiracy are not automatically a part of the conspiracy. But we do not understand these cases to hold that a conspiracy can never include an agreement to conceal the defendants' conduct. The distinction is between the government's attempting to infer the existence of a conspiracy to conceal "from circumstantial evidence showing merely that the conspiracy was kept secret and that the conspirators took care to cover up their crime in order to escape detection and punishment," *Grunewald v. United States, supra*, 353 U.S. at 402, and "an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission." *Id.* at 404. The conspirators in this case, signally including Corbitt, intended from the first to exert strenuous efforts to prevent discovery of the crime and of their involvement in it; the fact that two of the three conspirators were policemen supports the inference that concealment was part of the original conspiracy and not a spontaneous reaction to fear of arrest and prosecution. It was also a fair inference that the defendants agreed to keep trying to conceal the conspiracy for as long as they could, using their official positions where possible. And there is no

evidence that Corbitt, upon losing his position as chief of police of Willow Springs or at any other time, withdrew from the agreement. We must not forget that "withdrawal" is a term of art in the law of conspiracy. It is not enough that Corbitt ceased, "however definitively, to participate"; since he "did not communicate his abandonment to any of his co-conspirators and he did not make a clean breast to the authorities," he did not withdraw. *United States v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989). On the contrary, Corbitt hoped to get another chief's job in the western suburbs, the area of the conspiracy's operations, and there is no evidence of when, if ever, he ceased harboring such hopes.

4. But the very indefiniteness of the conspiracy's termination brings to the fore two serious issues with regard to sentencing.

a. The Sentencing Guidelines by their terms apply to crimes committed on or after November 1, 1987, and by interpretation to conspiracies that straddle this date. *United States v. Fazio*, 914 F.2d 950, 958-59 (7th Cir. 1990), and cases cited there. The district judge made no finding as to when the conspiracy ended. If it ended after November 1, 1987, then he should have sentenced the defendants on count two (the conspiracy count) under the Guidelines. The case must be remanded for a determination of when the conspiracy ended, and for resentencing Masters and Keating on count two if the judge finds that the conspiracy indeed ended after the Guidelines took effect. (Corbitt does not challenge his sentence, and the government has not cross-appealed.)

For guidance on remand, we consider at the parties' request whether, if the judge resentences these defendants under the Guidelines, the new sentences should be "stacked" on top of the sentences on count one. The Sentencing Guidelines provide, in section 5G1.2(d), that sentences on separate counts shall be consecutive if necessary to reach the total length of sentence prescribed by the Guidelines, which may exceed the statutory maximum on each count. We believe that this provision, whose validity

the defendants do not challenge, should govern the district judge in resentencing them on count two even though the sentence on count one is a pre-Guidelines sentence. For this is the procedure that will give maximum effect to the Guidelines within their intended domain, i.e., crimes committed after November 1, 1987.

b. There is an independent infirmity with regard to the $250,000 fine that the judge imposed on Masters, also under count two. The relevant provisions (18 U.S.C. §§ 3571, 3572, and Sentencing Guidelines § 5E1.2(d), if the conspiracy continued past November 1, 1987, and the repealed 18 U.S.C. §§ 3622, 3623 if it ended before) require the sentencing judge to consider a number of specified factors before imposing a fine, such as the burden on the defendant's family. 18 U.S.C. §§ 3622(a)(4) (repealed), 3572(a)(2). The judge made no findings with respect to any of these factors, and he must do so on remand before imposing a fine.

5. The jury ordered the defendants to forfeit $42,000 as "proceeds which the person [i.e., the defendant] obtained . . . in violation of" the RICO statute. 18 U.S.C. § 1963(a)(3). This is joint and several liability, *Fleischhauer v. Feltner*, 879 F.2d 1290, 1301 (6th Cir. 1989); *United States v. Caporale*, 806 F.2d 1487, 1506-09 (11th Cir. 1986), meaning that $42,000 is the cap on the total amount that the government can collect but that subject to the ceiling each defendant is liable for the full amount. Masters and Keating argue that the government computed this figure (which the jury accepted) by adding up the amounts paid to Masters, in legal fees and bribes, by persons whom the criminal enterprise assisted, whether by fixing their cases or by protecting them from the law. Masters in particular argues that this amount must be an overestimate of the proceeds he obtained, since he forwarded some of the bribe money to his coconspirators and other police officers, and since some at least of the legal fees were not bribes at all but payment for lawful legal services.

In fact the government presented the jury with evidence that Masters had obtained at least $66,000 in fees and bribes from the persons whom the enterprise assisted.

The government wanted the jury to find that about two-thirds represented bribes received by these defendants; and this was a reasonable estimate. The problem is that Masters did not keep all those bribes, yet he was made jointly and severally liable for the entire amount. Most but not all of the bribes that he passed on ended up in the pockets of his codefendants, but again they were found jointly and severally liable for the entire amount.

The statute is designed to force criminals to disgorge their ill-gotten gains. We may assume, therefore, as intimated in *Russello v. United States*, 464 U.S. 16, 22 (1983), that the proceeds to which the statute refers are net, not gross, revenues—profits, not sales, for only the former are gains. *United States v. Lizza Industries, Inc.*, 775 F.2d 492, 498 (2d Cir. 1985), came out the other way and allowed the recovery of gross proceeds, but the court made no effort to square its reading with the language of the statute. Furthermore, the statute says that it is the proceeds received by the defendants, not by their enterprise, that are forfeitable.

But the jury was properly instructed on these issues, and $42,000 was a reasonable estimate of the total amount that the three defendants kept from the bribes that Masters received. The fact that Masters did not keep the whole amount is irrelevant given the jointness of each of the defendants' liability. Each is fully liable for the receipts of the other members of the enterprise, subject to the overall ceiling of $42,000.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: February 6, 1991

BEFORE: Honorable William J. Bauer, Chief Judge
Honorable Richard A. Posner, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

Nos. 89-2851, 89-2872 and 89-2873

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALAN MASTERS, MICHAEL J. CORBITT, and JAMES D. KEATING,

Defendants-Appellants

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 CR 500, Judge James B. Zagel

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, AFFIRMED in part, VACATED in part, and REMANDED, in accordance with the opinion of this Court filed this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 28, 1991.

Before

Hon. WILLIAM J. BAUER, *Chief Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 89-2872 v.

MICHAEL J. CORBITT,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 88 CR 500—James B. Zagel, *Judge*.

ORDER

On February 19, 1991, defendant-appellant filed a petition for rehearing. All of the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

UNITED STATES OF AMERICA

v. Case Number: 88 CR 500-2

MICHAEL CORBITT

(Name of Defendant) Dennis Berkson
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count two after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 USC 1962(d)	Racketeering conspiracy	2

The defendant is sentenced as provided in pages 2 through 2 of this Judgment. The sentence is not imposed pursuant to the Sentencing Reform Act of 1984, but under prior law.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
344-36-9691

Defendant's mailing address:
Metropolitan Correctional Center
71 West Van Buren

Defendant's residence address:
10735 WEST 5TH AVENUE, APT 403
COUNTRYSIDE, IL

August 24, 1989
Date of Imposition of Sentence

/s/ James B. Zagel
Signature of Judicial Officer

JAMES B. ZAGEL,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

August 28, 1989
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWENTY (20) YEARS on count 2. The term of imprisonment imposed by this judgment shall run concurrently with the defendant's term of imprisonment pursuant to the judgment in docket number 87 CR 378-1, Northern District of Illinois.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

- ☐ at ____ a.m.
  p.m. on _____.
- ☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal